Supreme Court, U.S.
FILED

No. 04 507 AUG 9 2004

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In The

Supreme Court of the United States

Wade D. Chewning ----------Petitioner

v.

Branch Banking And Trust F/K/A Lexington State Bank ------ Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Wade D. Chewning
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QUESTIONS PRESENTED

A: Should the State court have honored the right to a jury trial as stipulated by the United States Constitution, Amendment VII [1791] ?

B: Should the State Court have Initially docketed the Case as a Jury trial ?

C: Should the State Court have refused to provide upon written request, the identity, location and/or source of the rules to be imposed upon the parties by the said court ?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgement below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was June 17, 2003. A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: August 22, 2003, and a copy of the order denying rehearing appears at Appendix B.

A timely petition for Writ of Certiorari to the South Carolina Supreme Court was denied on May 13, 2004, and a copy of the order denying the Petition for Writ of Certiorari appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT VII [1791].....

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any court of the United States, than according to the rules of common law".

STATEMENT OF THE CASE

8.13.1996	Respondent BB&T filed a complaint in the Lexington County Court of Common Pleas for foreclosure with deficiency requested in an amount exceeding twenty dollars.
6.9.1997	Petitioner files a motion with the Court of Common Pleas for a trial by Jury reference U. S. Constitution, Amendment VII followed by multiple motions for a trial by jury, all of which are denied.
6.9.1997	Initial hearing (objected to by Petitioner) before master-in-equity George Jefferson in this matter.
5.13.2004	S.C. Supreme Court Denies Writ of Certiorari.
8.9.2004	Petitioner submits request for Writ of Certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE PETITION

The wording of the VII Amendment to the United States Constitution is abundantly clear as to its words and intent regarding the protection of its citizens regarding trial by jury. Any and all use of Judicial/Litigant trickery, manipulation of the procedures and/or rules of court with the intent of obfuscating and/or effectively denying these rights to an American Citizen results in a mockery of Justice and Due Process.

The Constitutional protections trump any half-baked law, statues or case law presented.

The proper, respectful and lawful resolution of this issue is vital to all American Citizens.

There can be no dispute that the controversy is in excess of twenty dollars, petitioner demanded a jury trial prior to any hearing and was denied same.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Wade D. Chewning

August 9, 2004 Lexington, South Carolina

APPENDIX "A"

The South Carolina Court of Appeals

Branch Banking and Trust, f/k/a The Lexington State Bank,
Respondent,

v.

Wade D. Chewning and Jeannie R. Chewning, Defendants,
of whom Wade D. Chewning is, Appellant.

The Honorable Clyde N. Davis, Jr.
Lexington County
Trial Court Case No. 1996-CP-32-01827

Unpublished Opinion No. 2003-UP-397
Submitted May 12, 2003 - Filed June 17, 2003

AFFIRMED

Wade D. Chewning of Lexington, pro se

Deborah R. J. Shupe, of Columbia; for Respondent.

PER CURIAM: This is a mortgage foreclosure action. The master-in-equity found in favor of Branch Banking And Trust (BB&T) and issued a Judgement of Foreclosure and Sale. Wade D. Chewning appealed the Master's order to the circuit court. The circuit court

affirmed the master's order in it's entirety. Chewning now appeals the circuit court order. We affirm.

LAW/ANALYSIS

I.

Chewning contends the circuit court erred when it failed to grant his motion to hold the hearing in abeyance. Chewning sought to continue the hearing pending BB&T's disclosure of documents requested in the motion in order for Chewning "to make an informed and prepared response in relation to the hearing." The documents requested by Chewning included those sought in the foreclosure hearing before the master.

A trial court's decision to deny a motion for continuance will not be overturned absent a clear abuse of discretion. State v. McMillian, 349 S.C. 17, 21, 561 S.E.2d 602, 604 (2002). The circuit court was sitting in an appellate capacity to review the master's ruling. A record on appeal shall not include matters not presented to the lower court or tribunal. Rule 210(c), SCAR. Since the master denied Chewning's motion to include the documents, the documents were not presented to the trial court and were properly excluded from the record on appeal. Even assuming the circuit court had ordered disclosure of the documents, given the court was sitting in its appellate capacity, the documents could not have been introduced to the circuit court and the judge properly denied Chewning's motion for continuance.

Inasmuch as Chewning appeal the master's denial of his

motion for disclosure of appraisal and deficiency judgement information, Chewning does not provide any authority for why the master should have ordered BB&T to disclose this information. Chewning does not demonstrate how the failure to disclose this information prejudiced his defense of the foreclosure action. When the rights of discovery have not been accorded, prejudice must be presumed. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 Ct. App. 1997). Here, however, Chewning did not avail himself of any of the rights of discovery and cannot claim prejudice.

Chewning has not shown that BB&T failed to comply with any discovery requests for this information and Chewning did not move for sanctions. Chewning did not serve any requests for documents pursuant to Rule 34, SCRCP. The South Carolina Rules of Civil Procedure do not permit a party to request the production of documents through a motion filed with the court, other than a motion for an order compelling discovery once a party has objected to discovery or failed to respond to discovery. Rule 37(a), SCRCP.

Accordingly, the master did not err in denying Chewning's motion for disclosure of documents.

Chewning argues he was entitled to a jury trial and the master should not have heard the action.

To request a jury trial, a party must "[serve] upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such

issue." Rule 38(b), SCRCP. The failure of a party to serve a demand as required by this rule ..... constitutes a waiver by him of trial by jury." Rule 38 (d), SCRCP. Chewning did not timely file a request for a jury trial. Therefore, he waived the right to request a jury trial. Rowe Furniture Corp. V. Carolina Wholesale Furniture Co., 292 S.C. 575, 357 S.E.2d 725 (Ct. App. 1987).

Moreever, a party must immediately appeal an order of reference to a master since it affects the party's subtantial right to a mode of trial. Creed v. Stokes, 285 S.C. 542, 331 S.E.2d 351 (1985). Chewning did not immediately appeal from the order of reference and the order became the law of the case. Id.

In any event, an action to foreclose a mortgage is an equitable action. BB&T of SOUTH CAROLINA v. Kidwell, 350 S.C. 382, 565 S.E.2d 316 (Ct. App. 2002). If the underlying claim is equitable in nature there is no right to a jury trial. Loyola Fed. Sav. Bank v. Thomasson Props., 318 S.C. 92, 456 S.E.2d 423 (Ct. App. 1995). Since this is an action in equity and Chewning did not assert any counterclaims, he was not entitled to a jury trial.

The master did not err in denying Chewning's motion for a jury trial.

III

Chewning argues the master erred by failing to recuse himself. Chewning's recusal motion alledged the master had ruled adversely to him in another matter.

A party seeking to compel recusal by a judge must show some evidence of bias or prejudice on the part of the judge against the party. State v. Jackson, 353 S.C. 625, 578 S.E.2d 744 (CT. App. 2003) The party must do more than simply allege bias or prejudice. Id. The alleged bias or prejudice must stem from an extra-judicial source and result in a decision based on information other than what the judge learned during the course of the proceedings. Id.
Without evidence of bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Id. "When no evidence is presented other than prior appearances by a party which resulted in "adverse" rulings by the judge, the judge is not required to recuse himself." Payne v. Holiday Towers, Inc., 283 S.C. 210, 217, 321, S.E.2d 179, 183 (Ct. App. 1984).

Chewning alleged only that the master was biased against him based on an adverse ruling rendered against him in another matter. There is no evidence in the record showing any bias or prejudice toward Chewning. The master did not err in failing to recuse himself.

IV

Chewning argues the master erred by questioning a witness during the course of the proceedings.

During Chewning's cross-examination of BB&Ts witness, Chewning asked to see a copy of the appraisal used as a basis for the deficiency judgement. The master refused to allow Chewning access to the document and asked the witness if he had a copy of the appraisal with him. The

master also questioned the witness concerning his knowledge of the bank's loan-making policies and appraisal methods. Chewning contends this questioning constitutes reversible error.

Initially, this issue is not preserved for review. Chewning did not object to the master's questioning of the witness. For an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial judge. Otherwise, the issue will not be considered on appeal. Humbert v. State, 345 S.C. 332, 548, S.E.2d 862 (2001).

Concerning the merits, a trial judge "may properly question witnesses in order to clarify and to promote a proper understanding of the testimony." State v. Stroman, 281 S.C. 508, 511, 316 S.E.2d 395, 398 (1984) (quoting State v. Rinck, 280 S.E.2d 912, 921 (N.C. 1981). The party claiming the judge's questioning was improper must demonstrate prejudice by the judge's questions. State v. Monroe, 262 S.C. 346, 204 S.E.2d 433 (1974). The master's questioning of the witness did not prejudice Chewning and does not constitute reversable error. The questions merely clarified whether the witness had any personal knowledge concerning the bank's appraisal methods and whether the witness possessed an appraisal report.

V

Chewning argues the master should have granted his motion for continuance based on improper and inadequate service of the pleadings.

Chewning"s motion alleged service was improper because the affidavit of service referenced an incorrect case number. At the foreclosure hearing, BB&T acknowledged this clerical error and submitted a corrected affidavit of service reflecting the proper case number. ①

The record clearly reveals Chewning received a correctly-captioned summons and complaint and thereafter filed an answer. Chewning was aware of the nature of the proceedings despite any clerical error in the affidavit of service and cannot show any prejudice entitling him to a continuance on this basis. The decision to deny a motion for continuance rests within the sound discretion of the trial court and will not be reversed absent a clear showing of an abuse of discretion. Wilson v. Walker, 340 S.C. 531, 532 S.E.2d 19 (Ct. App. 2000) The master did not abuse his discretion in denying Chewning's motion for a Continuance based on the clerical error in the affidavit of service.

CONCLUSION

Based on the foregoing analsys, the circuit court's order affirming the master's judgement is

AFFIRMED.

HEARN, C. J., CONNER AND STILWELL, JJ., concur.

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① A review of the record indicates the case number written on the

FACTS

BB&T filed an action to foreclose a mortgage and demanded the right to a deficiency judgement on a note and mortgage executed by Chewning. After filing the action, BB&T moved to refer the matter to the master-inequity. Chewning did not conscent to the reference and at a hearing before the circuit court Chewning moved to deny reference of the case to the master on the grounds that the master was biased against him. Chewning made no other motions at he hearing. As an alternative to reference to the master, the circuit court provided the parties an opportunity to agree upon a special referee. When this plan failed, the circuit court judge referred the matter to the master.

Prior to the foreclosure hearing, Chewning filed motions seeking a continuance, a jury trial, recusal of the master, and an order requiring BB&T to provide him copies of property appraisals and documentation regarding BB&T's basis for a deficiency judgement. Chewning also filed a motion for reconsideration with the circuit court regarding its decision to refer the case to the master. Prior to the start of the hearing on the merits, the master denied all of Chewning's pending motions. Chewning failed to present a defense during the foreclosure hearing, and the master ruled in favor of BB&T on its action to foreclose the mortgage. The property was sold on October 7, 1997, and

① original affidavit of service corresponded to the lis pendens filed in conjunction with the summons and complaint. The affidavit of service states the process server served upon Chewning the lis pendens along with the summons, complaint, and verification.

the master issued an order for deficiency judgement. Sometime after the merits hearing, the circuit court denied Chewning"s motion for reconsideration. Chewning did not appeal the order granting BB&T's motion to refer the case to the master or the denial of the motion for reconsideration.

Chewning appealed the master's ruling. This court denied Chewning's appeal for lack of jurisdiction because the order referring the case to the master did not include the right to a direct appeal to the Supreme Court. Branch Banking and Trust v. Chewning, Op. No. 98-UP-514 (S.C. Ct. App. Filed Nov. 23, 1998). The Supreme Court affirmed this court's ruling, but remanded the case to the circuit court for appellate review of the master's order granting foreclosure and awarding a deficiency judgement. Branch Banking & Trust v. Chewning, Op. No. 99-MO-048 (S.C. Sup. Ct. Filed June 24, 1999).

On remand, Chewning moved to hold the circuit court hearing in abeyance based upon BB&T's alleged failure to provide him the documents requested by motion prior to the foreclosure hearing. Chewning also moved for a jury trial. The circuit court denied both motions, finding the requested documents irrelevant because they were not included in the record on appeal from the foreclosure hearing and Chewning's motion for a jury trial was included in the merits of his appeal. The circuit court affirmed the master's Judgement of Foreclosure and Sale in its entirety. Chewning Appeals.

APPENDIX "B"

The South Carolina Court of Appeals

Branch Banking and Trust, f/k/a The Lexington State Bank,
Respondent,

v.

Wade D. Chewning and Jeannie R. Chewning, Defendants,
of whom Wade D. Chewning is, Appellant.

The Honorable Clyde N. Davis, Jr.
Lexington County
Trial Court Case No. 1996-CP-32-01827

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

s/ HEARN , CONNER and STILLWELL

Columbia, South Carolina 8/22/2003

APPENDIX "C"

The Supreme Court of South Carolina

Branch Banking and Trust, f/k/a The Lexington State Bank,
Respondent,
v.
Wade D. Chewning and Jeannie R. Chewning, Defendants,
of whom Wade D. Chewning is, Appellant.

The Honorable Clyde N. Davis, Jr.
Lexington County
Trial Court Case No. 1996-CP-32-01827

Dear Mr. Chewning:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

Petition for Writ of Certiorari Denied

s/ Jean H. Toal C.J.
For the Court

Justice Costa M. Pleicones, not participating

May 13, 2004